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### A "Narrow Exception" Run Amok: How Courts Have Misconstrued Employee-Rights Laws' Exclusion of "Policymaking" Appointees, and a Proposed Framework for Getting Back on Track

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## **A “NARROW EXCEPTION” RUN AMOK: HOW COURTS HAVE MISCONSTRUED EMPLOYEE-RIGHTS LAWS’ EXCLUSION OF “POLICYMAKING” APPOINTEES, AND A PROPOSED FRAMEWORK FOR GETTING BACK ON TRACK**

Angela Galloway

*Abstract:* The civil rights and workplace protections afforded some government workers vary vastly nationwide because federal circuit courts disagree over how to interpret an exemption common to five landmark employment statutes. Each statute defines “employee” for its purposes to exclude politicians and certain categories of politicians’ appointees—including government employees appointed by elected officials to serve at “the policymaking level.” Neither Congress nor the United States Supreme Court has defined who belongs to the “policymaking-level” class. Consequently, lower federal courts across the country have adopted their own standards to fill the gap, creating a wide circuit split. At stake in this employment law vagary are basic worker rights guaranteed by major federal statutes. The U.S. Supreme Court or Congress should articulate a lucid definition for the exception for appointees on the “policymaking level” that honors Congress’s intent for a narrow exception: the exemption should apply only to positions characterized by both a direct working relationship with the appointer and an explicit duty to make substantive policy.

### **INTRODUCTION**

Consider the professionals that elected officials appoint to serve them at the “policymaking level” of American government. Agency directors likely spring to mind. Perhaps also executive cabinet members. But do probation officers<sup>1</sup> or health inspectors?<sup>2</sup> Would you include part-time assessors<sup>3</sup> or sheriffs’ deputies?<sup>4</sup> Some federal judges do deem such employees as serving at the “policymaking level”—a status that can cost workers some of their basic civil rights protections.

Meanwhile, other federal courts take a contrary approach—declining to label as policymakers,<sup>5</sup> for instance, the director of a senior services

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1. O’Reilly v. Montgomery Cnty., No. 102CV1242-DFH, 2003 WL 23101795, at \*10 (S.D. Ind. Feb. 24, 2003).

2. Heck v. City of Freeport, 985 F.2d 305 (7th Cir. 1993).

3. Beckmann v. Darden, 351 F. Supp. 2d 139 (S.D.N.Y. 2004).

4. Heideman v. Wirsing, 7 F.3d 659, 664 (7th Cir. 1993); Upton v. Thompson, 930 F.2d 1209, 1218 (7th Cir. 1991). In both cases, probationary deputies asserted they had been fired in improper acts of political patronage.

5. In each case, that determination was ultimately left to a jury; the judges in each rejected

agency,<sup>6</sup> a police commander,<sup>7</sup> the head of a juvenile detention training center,<sup>8</sup> and—again—sheriffs’ deputies.<sup>9</sup>

The difference: geography. Whether courts deem politicians’ appointees<sup>10</sup> as “policymaking-level” workers—and thus beyond the reach of workers’ rights statutes—depends on where the workers live.

The civil rights and workplace protections afforded some government workers vary vastly nationwide because federal circuit courts disagree over how to interpret an exemption shared by five landmark employment statutes. Congress excluded elected officials and their top advisers from the laws protecting employees against discrimination<sup>11</sup> and substandard employment conditions.<sup>12</sup> Each statute defines “employee” for its purposes<sup>13</sup> to exclude politicians and certain categories of politicians’ appointees who are not protected by civil service laws.<sup>14</sup> The exempted categories—virtually identical among the statutes—include government employees who are appointed by elected officials to serve at “the

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defendants’ claims that the plaintiffs were excluded as a matter of law under an exemption for “policymaking level” appointees.

6. Jones-Walsh v. Town of Cicero, No. 04 C 6029, 2005 WL 2293671, at \*4 (N.D. Ill. Sept. 14, 2005).

7. Gomez-Mesquita v. City of Detroit, No. 06-12844, 2007 WL 2225859, at \*4 (E.D. Mich. Aug. 2, 2007).

8. Collins v. Cook Cnty., No. 06 CV 6651, 2008 WL 4925009, at \*5 (N.D. Ill. Nov. 14, 2008).

9. Morgan v. Sheriff of Tangipahoa Parish, Civil Action No. 77-3814, 1979 WL 108, at \*2 (E.D. La. Mar. 28, 1979); Howard v. Ward Cnty., 418 F. Supp. 494, 502 (D.N.D. 1976).

10. The author has chosen the term “politicians’ appointees” over the more commonly used phrase “political appointees” because the latter implies a broader and potentially off-mark status, i.e., employees appointed by a political process. By contrast, the statutory term at issue here refers to only employees appointed directly by elected officials.

11. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006); Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2006); Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

12. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006).

13. The exceptions are codified as follows: 29 U.S.C. § 203(e)(2)(C); 29 U.S.C. § 630(f); 29 U.S.C. § 2611(3) (incorporating by reference the definition of the FLSA); 42 U.S.C. § 2000e(f). 42 U.S.C. § 2000e(f) reads, in part: “The term ‘employee’ means an individual employed by an employer, except that the term ‘employee’ shall not include any person elected to public office in any State or political subdivision of any State . . . or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.”

14. State civil service laws govern terms and conditions of public employment. They include standards for appointment and termination; they are intended to foster merit-based decisions and prevent politically-motivated public employment actions. 15A AM. JUR. 2D *Civil Service* § 1. (“[T]he historical and fundamental purpose of the civil service and its merit system principles is to insulate a state work force from political influence so as to improve the effectiveness and efficiency of the state government.”).

polymaking level.”<sup>15</sup> Neither Congress nor the United States Supreme Court has defined who belongs to that “polymaking” class.<sup>16</sup> The result is a statutory definition of “employee” so convoluted one federal judge described it as “an outstanding example of bad draftsmanship.”<sup>17</sup> Consequently, lower federal courts across the country have adopted their own standards to fill the gap, creating a wide circuit split.<sup>18</sup> In 2010, the Seventh Circuit expressly declined to bridge the gap, deciding instead that the exception denied discrimination protections to all nine hundred<sup>19</sup> of Illinois’s assistant state’s attorneys.<sup>20</sup>

Dozens of cases illustrate the inconsistent application of the “polymaking” exception. For example, one federal judge in New Mexico dismissed a former town administrator’s age discrimination claim after deeming the position as on “polymaking level,” in part because the administrator could recommend policies to superiors.<sup>21</sup> But an Iowa judge came to the opposite conclusion on similar facts, finding that a county agency director did not qualify for the exception because he could *only* recommend policies, while his superiors retained the final

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15. In each statute, the exception is defined as being on “the” or “a” “polymaking level,” never as “polymaker.” In fact, the First Circuit Court of Appeals said that distinction is consequential in *EEOC v. Massachusetts*, 858 F.2d 52, 56 (1st Cir. 1988). The point of the distinction is well taken. However, for the sake of simplicity, this Comment will at times use abbreviated references to the exception, for example, “polymaker exception.”

16. However, the United States Supreme Court has held that Missouri’s appointed state judges are at the polymaking level for purposes of discrimination statutes, and in doing so suggested that state judges are thus broadly excluded. *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991). In *Gregory*, the U.S. Supreme Court did not endorse a general standard for evaluating whether an employee serves on “polymaking level.” *Id.* Instead, it ruled narrowly on the question of whether the statute, i.e., the Age Discrimination in Employment Act (ADEA), applied to judges: “We will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included* . . . In the context of a statute that plainly excludes most important state public officials, ‘appointee on the polymaking level’ is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not.” *Id.* (emphasis in original).

17. *Howard v. Ward Cnty.*, 418 F. Supp. 494, 502 (D.N.D. 1976).

18. *Compare* *Opp v. State’s Att’y of Cook Cnty.*, 630 F.3d 616, 620 (7th Cir. 2010), *cert. denied*, \_\_\_ S.Ct. \_\_\_, 2011 WL 4530126 (U.S. Oct. 3, 2011) (No. 10-1163), *with* *Butler v. N.Y. State Dep’t of Law*, 211 F.3d 739, 746 (2d Cir. 2000).

19. Brief for Plaintiff-Appellant Leonard Cahnmann at 13, *Opp*, 630 F.3d 616 (No. 10-1060), 2010 WL 1062296.

20. *Opp*, 630 F.3d at 621–22. In *Opp*, the Seventh Circuit dismissed appeals by three plaintiffs. *Id.* at 622. The Circuit had previously consolidated the cases brought by two of the plaintiffs, *Opp* and Barrett. Brief of Defendant-Appellees, *Opp*, 630 F.3d 616 (Nos. 09-3714, 09-3923), 2010 WL 3950610, at \*6. The Circuit declined to consolidate the claim by the third party, Cahnmann, but decided his appeal the same day. *Id.*

21. *Terry v. Town of Red River*, Civ. No. 90-206 SC, 1995 WL 442099, at \*4 (D.N.M. Aug. 8, 1991) (finding town administrator served on the polymaking level because he enjoyed discretion and could recommended policy).

say.<sup>22</sup> Another judge barred a discrimination claim by a deputy elections supervisor because he held authority to “arrest, subpoena and investigate possible violations of elections laws,” which the judge interpreted as policymaking-level duties.<sup>23</sup> But another judge allowed a former sheriff deputy’s suit, explaining that the policymaking exemption was “aimed at persons such as members of a governor’s cabinet.”<sup>24</sup> And a judge in Indiana said a probation officer qualified as a policymaker because her decisions “may promote or undermine the policies” of others.<sup>25</sup> But a federal judge in Texas allowed a suit by a former city manager, finding she was not exempted because she did not actually *make* policy—she merely implemented it.<sup>26</sup>

At stake in this employment law vagary are basic worker rights guaranteed by federal statutes. Title VII of the Civil Rights Act of 1964 bars discrimination based on race, color, religion, sex, or national origin.<sup>27</sup> The Age Discrimination in Employment Act (ADEA) prohibits age discrimination against workers who are at least forty years old.<sup>28</sup> The Fair Labor Standards Act (FLSA) provides minimum wage and overtime pay protections.<sup>29</sup> The Equal Pay Act (EPA) mandates equal pay between the sexes for comparable work.<sup>30</sup> And the Family and Medical Leave Act (FMLA) requires larger employers to provide unpaid leave to employees with serious health conditions or family caretaking obligations.<sup>31</sup> According to the shared definition of “employee,” each of

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22. *Brown v. Poke Cnty.*, 811 F. Supp. 432, 437 (S.D. Iowa 1992).

23. *Russo v. Ryerson*, No. 01-CV-4458 JLL, 2006 WL 477006, at \*9 (D.N.J. Feb. 28, 2006). In the unpublished opinion, the court rejected the plaintiff’s assertion that his duties were “more administrative than discretionary,” with Russo noting that he “did not speak on behalf of a policymaker and made no significant changes to the election supervision system.” *Id.* Still, the court held that the plaintiff enjoyed sufficient discretion to qualify for the policymaking exception: “[A] position which possesses the authority to arrest, subpoena and investigate possible violations of elections laws necessarily involves policy considerations. Although Russo . . . did not have the discretion *not* to enforce the elections laws, [he] possessed broad discretion regarding how to structure and execute investigations into possible violations. These exercises of discretion constitute policymaking.” *Id.*

24. *Howard v. Ward Cnty.*, 418 F. Supp. 494, 502 (D.N.D. 1976); *see also* *Morgan v. Sheriff of Tangipahoa Parish*, Civil Action No. 77-3814, 1979 WL 108, at \*2 (D. La. Mar. 28, 1979).

25. *O’Reilly v. Montgomery Cnty.*, No. 102CV1242-DFH, 2003 WL 23101795, at \*10 (S.D. Ind. Feb. 24, 2003).

26. *Gomez v. City of Eagle Pass*, 91 F. Supp. 2d 1000, 1004–05 (W.D. Tex. 2000).

27. Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

28. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 631(a) (2006).

29. Fair Labor Standards Act of 1938, 29 U.S.C. § 201–219, 203(e)(2)(C)(ii)(III) (2006 & Supp. III 2009), *amended by* Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

30. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006).

31. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601, 2611(3) (2006), incorporating by

these statutes denies protection to workers appointed at the “policymaking level”—making interpretation of that term critical to determining public employees’ rights.

The unresolved scope of the “policymaking-level” exemption results in judicial discord over who is protected by the laws against discrimination and shoddy work conditions.<sup>32</sup> At one end of the spectrum, the Seventh Circuit reads the phrase broadly: the exception denies protection to employees who so much as implement policies, or offer suggestions about them.<sup>33</sup> Several other circuits embrace a much narrower approach, holding that the exception applies only to top appointees “closely associated” with the elected officials who appointed them.<sup>34</sup>

This Comment asserts the need for a single, lucid definition of the “policymaking-level” exception, and endorses an approach based on statutory language, legislative history and policy objectives. Part I introduces the laws at issue and the development of the exception for appointees at the “policymaking level.” Part II examines the split between: (1) the Seventh Circuit’s long-standing but unique approach; and (2) the narrower standard most thoroughly developed by the Second Circuit and generally accepted by several other circuits. Part III argues that both approaches miss the mark, and advocates instead for a more precise three-part analysis that better reflects congressional intent: the “policymaking-level” exception should apply only to professionals who work directly with their appointers and who establish official policy of a substantive nature.

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reference the exemptions identified in the FLSA at 29 U.S.C. § 203(e) (2006).

32. Congress has enacted a separate remedy under the Government Employees Rights Act (GERA) for some appointees asserting employment discrimination, including Title VII and ADEA claims. 42 U.S.C. § 2000e-16(a)–(c) (2006), *amended by* the Congressional Accountability Act, Pub. L. No. 104-1, 109 Stat. 3 (Jan. 23, 1995); *see also* 1 Emp. Discrim. Coord. Analysis of Federal Law § 13:6. GERA requires aggrieved workers seek administrative relief from the Equal Employment Opportunity Commission (EEOC). *Kelley v. City of Albuquerque*, 542 F.3d 802, 808 n.4 (10th Cir. 2008). Only once that review is complete might workers get access to court by appealing an adverse EEOC decision to the United States Court of Appeals. *Id.* Once the EEOC has made a determination, de novo review is not available. *Guy v. Illinois*, 958 F. Supp. 1300, 1306 (N.D. Ill. 1997). Also, if the EEOC finds for the worker, unlike under Title VII, the worker is “not entitled to recover punitive damages under GERA.” *Dyer v. Radcliffe*, 169 F. Supp. 2d 770, 775 (S.D. Ohio 2001).

33. *See, e.g., Warzon v. Drew*, 60 F.3d 1234, 1239 (7th Cir. 1995) (noting that “Warzon’s complaint and attachments are replete with information showing that she had significant input and authority over” government policies).

34. This approach is most fully developed by the Second Circuit. *See infra* Part II.C.

## I. CONGRESS INTENDED TO CATALYZE SWEEPING SOCIAL CHANGE THROUGH THE FEDERAL EMPLOYEE-RIGHTS STATUTES

The statutes<sup>35</sup> subject to this interpretive inconsistency share two major policy goals: to shield workers from discrimination based on their membership in a protected class, and to protect employees from legally unacceptable pay and workplace conditions.<sup>36</sup> They stem from Congress's aspiration to catalyze fundamental social change.<sup>37</sup>

### A. *The Statutes at Stake Protect Employees from Poor Work Conditions and Discrimination Based on Race, Religion, Age, and Caregiver Status*

The oldest of the statutes at issue is the FLSA, which established a national minimum wage, overtime pay protections, and child labor standards, with some significant categorical exceptions.<sup>38</sup> The goal was to protect workers from "oppressive" work conditions and "substandard" wages.<sup>39</sup> In 1963, Congress broadened the FLSA through the EPA, which bars sex-based wage disparities.<sup>40</sup>

The most comprehensive of the anti-discrimination statutes at issue is the Civil Rights Act of 1964,<sup>41</sup> which bars certain forms of discrimination<sup>42</sup> and aims to foster racial integration.<sup>43</sup> The Act is best

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35. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006); Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2006); Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

36. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981).

37. *See infra* Part I.A.

38. 29 U.S.C. §§ 201–219.

39. *Barrentine*, 450 U.S. at 739 ("The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.'" (quoting 29 U.S.C. § 202(a)).

40. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d)).

41. Civil Rights Act of 1964, 42 U.S.C. 2000a–2000h ("[T]o enforce the constitutional right to vote . . . to provide injunctive relief against discrimination in public accommodations . . . to protect constitutional rights in public facilities and public education . . . to prevent discrimination in federally assisted programs [and employment] . . . and for other purposes.").

42. 42 U.S.C. § 2000a; *see also* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 246 (1964) ("The Act as finally adopted was most comprehensive, undertaking to prevent through peaceful and voluntary settlement discrimination in voting, as well as in places of accommodation

known for its provisions mandating school desegregation and prohibiting racial discrimination in places of public accommodation.<sup>44</sup> Additionally, Title VII of the Act bars most employers<sup>45</sup> from employment discrimination against protected classes.<sup>46</sup> The U.S. Supreme Court has described the Act’s broad remedial purpose as: “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”<sup>47</sup> At the time of the Act’s passage, Congress considered fairness in employment an integral element to the success of its overall civil rights goals.<sup>48</sup> Over the decades, Congress has broadened the law’s scope<sup>49</sup> and courts have liberally construed the Act.<sup>50</sup> For example, the U.S. Supreme Court has read it to include a prohibition against unintentional discrimination through policies that have a “disparate impact” on protected classes.<sup>51</sup>

In 1967, Congress added the ADEA to the civil rights arsenal, barring

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and public facilities, federally secured programs and in employment.”).

43. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202 (1979).

44. 42 U.S.C. §§ 2000a(a), c to c-9 (2006).

45. 42 U.S.C. § 2000e(b) (2006). The statute defines an “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person” excluding the United States government, Indian tribes, any department or agency of the District of Columbia, and “a bona fide private membership club (other than a labor organization).” *Id.*

46. 42 U.S.C. § 2000e-5 (2006). The statute bars discrimination based on race, color, religion, sex, or national origin. *Id.*

47. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

48. The U.S. Supreme Court has said: “Congress’s primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with ‘the plight of the Negro in our economy.’” *Weber*, 443 U.S. at 202–03 (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)). The *Weber* Court noted that during Congressional debate, Sen. Humphrey highlighted statistical trends showing that the disparity between nonwhite unemployment and white unemployment had nearly doubled from 1947 to 1962. “Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend was reversed . . . . [I]t was clear to Congress that ‘[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them. . . . [I]t was to this problem that Title VII’s prohibition against racial discrimination in employment was primarily addressed.” *Id.*

49. *See infra* Part I.B.

50. Courts generally read Title VII liberally in order to support its policy objectives. Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 75 n.4 (1984) (citing *Furnco Constr. Co. v. Waters*, 438 U.S. 567 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Rowe v. Gen. Motors Corp.* 457 F.2d 348 (5th Cir. 1972)).

51. *See Griggs*, 401 U.S. at 431.



some workplace discrimination based on relatively old age.<sup>52</sup> Congress intended the ADEA to “promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.”<sup>53</sup> As with Title VII, Congress hoped that the ADEA would foster social change.<sup>54</sup>

Congress enacted the FMLA in 1993 largely to address a specific area of workplace sex discrimination: bias against women workers based on their status as family caregivers.<sup>55</sup> Congress found that “family caretaking often falls on women,” affecting their working lives more than that of men and creating “serious potential” for discrimination.<sup>56</sup> The FMLA requires covered employers to provide eligible workers up to twelve weeks of unpaid leave per year to care for a new baby or a relative with a “serious health” condition.<sup>57</sup> The FMLA applies to those employed by businesses with staffs of fifty or more workers.<sup>58</sup>

Each statute initially exempted from its protections a substantial work force: government employees. Congress incrementally expanded each statute to cover many public employees—but each time carved out a number of exceptions, including the exclusion for political appointees on the policymaking level.<sup>59</sup>

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52. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (current version at 29 U.S.C. § 621(b) (2006)). The U.S. Supreme Court has said, “[T]he ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young.” *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 590–91 (2004). Also, “[T]he ADEA, among other things, makes it unlawful for an employer ‘to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.’” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991) (quoting 29 U.S.C. § 623(a)(1)). The ADEA applies to workers at least forty years old and recognizes defenses including “age as a bona fide occupational qualification, differentiation based on reasonable factors other than age, discharge or other personnel action for good cause, and observation of the terms of a bona fide seniority or employee benefit plan.” 75 AM. JUR. *Trials* § 363 (2000).

53. 29 U.S.C. § 621(b).

54. *See McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995) (“Congress designed the remedial measures in these statutes to serve as a ‘spur or catalyst’ to cause employers ‘to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges’ of discrimination.” (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975))).

55. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (current version at 29 U.S.C. §§ 2601–2654 (2006)).

56. 29 U.S.C. § 2601(a)(5)–(6).

57. 29 U.S.C. § 2612(a)(1)(A), (C).

58. 29 U.S.C. § 2611(4)(A)(i).

59. *See infra* Part I.B.

*B. Congress Later Expanded Several of the Worker Protection Statutes to Include Government Workers—with Narrow Exceptions*

Title VII suffered a rocky start and weak enforcement due in large part to Congress’s decisions to limit the enforcement powers of the EEOC<sup>60</sup> and to exclude public workers from the Civil Rights Act’s protection.<sup>61</sup> Civil rights advocates persistently demanded that Congress expand that Act, complaining that the law failed to protect employees of schools as well as local, state, and federal governments despite widespread acknowledgement of discrimination by such employers.<sup>62</sup> In 1972, Congress addressed those issues by amending Title VII, substantially bolstering the EEOC’s authority and expanding the statute to protect state and local government employees.<sup>63</sup> This change immediately brought more than ten million additional workers within the statute’s ambit.<sup>64</sup>

Still, lawmakers excluded several categories of public workers from coverage, including the category of workers appointed at the policymaking level. The “very narrow” exceptions originally proposed by Senator Sam Ervin of North Carolina<sup>65</sup> deny coverage to government employees, except those protected by state civil service laws. The exemptions apply to (1) elected officials and (2) staffers appointed by an elected official to serve on the official’s personal staff, on a “policymaking level” or as “an immediate adviser.”<sup>66</sup> When the Congressional conference committee adopted the amendment, it “re-emphasized its narrow coverage.”<sup>67</sup> The committee directed that the

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60. George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Opportunity Employment Act of 1972*, 40 GEO. WASH. L. REV. 824, 824–25 (1972) (noting that the original law allowed the federal government very limited powers and as a result, “the reality for most aggrieved individuals was a long round of negotiations with employers who, more often than not, were undeterred by the threat of an individual suit and simply refused to comply”).

61. *Id.* at 847.

62. *Id.* at 847–48.

63. *Id.*

64. *Id.* Sape also noted that “studies seem to indicate that the employment practices of the states are at least as discriminatory as those found in the private sector . . . . The intention of Congress in expanding Title VII to include state and local governments was to provide an effective remedy through federal action to governmental employees.” *Id.* at 848–49 (noting that it did not supplant existing remedies under 42 U.S.C. § 1983 (2006)).

65. *Id.* at 861.

66. Equal Opportunity Act of 1972, 42 U.S.C. § 2000(e)–(f) (2006).

67. Sape, *supra* note 60, at 861. Writing shortly after the amendment’s adoption four decades ago, Sape also predicted: “Despite this language there undoubtedly will be extensive litigation involving this issue, resulting from the infinite variety of state and local government hierarchies, jobs and local personnel systems which will seek to maximize the exemption.” *Id.* at 862.

exceptions applied narrowly and only to employees at the “highest policymaking levels,” such as cabinet members.<sup>68</sup>

Two years after Congress added most local government workers to the scope of Title VII, it similarly amended the ADEA.<sup>69</sup> Because of the amendment’s sparse legislative history and the fact that it was modeled after Title VII, courts generally turn to Title VII’s legislative history (described above) for interpretive guidance.<sup>70</sup>

As with the discrimination statutes, state and local governments were initially exempted from the FLSA. Congress began narrowing that exemption in 1966, when it extended minimum wage and overtime standards to public hospitals, schools and certain mass-transit agencies.<sup>71</sup> In 1974, Congress expanded the statute’s scope to include nearly all state and local government employees.<sup>72</sup> Today, the FLSA excludes elected officials and their appointees in language nearly identical to that used in the amended Title VII and the ADEA.<sup>73</sup> The modern definition of

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68. *Id.* at 862 (citing 118 CONG. REC. S3461 (daily ed. Mar. 6, 1972); 118 CONG. REC. H1694 (daily ed. Mar. 8, 1972) (“This exemption is intended to be construed very narrowly and is in no way intended to establish an overall narrowing of the expanded coverage of State and local government employees.”)).

69. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28, 88 Stat. 2747 (current version at 29 U.S.C. § 630(b)(2) (2006)).

70. *See, e.g.*, *Butler v. N.Y. State Dep’t of Law*, 211 F.3d 739, 747 (2d Cir. 2000); *Montgomery v. Brookshire*, 34 F.3d 291, 294–95 (5th Cir. 1994); *Tranello v. Frey*, 962 F.2d 244, 249 (2d Cir. 1992) (“The definition of ‘employee’ found in ADEA, however, was patterned after the virtually identical provision contained in Title VII.”); *EEOC v. Vermont*, 904 F.2d 794, 798 (2d Cir. 1990), *overruled in part by* *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *EEOC v. Massachusetts*, 858 F.2d 52, 55–56 (1st Cir. 1988). *See generally* Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog that Didn’t Bark*, 39 WAYNE L. REV. 1093, 1099–101 (1993). Eglit discusses “instances of joint development [of the two statutes], keyed to similar statutory language.” *Id.* at 1100. He refers to the statutes as “statutory cousin[s]” that have undergone “joint evolution” and “tandem development.” *Id.* at 1097–103. Courts also turn to Title VII’s history to evaluate the FLSA. *Birch v. Cuyahoga Cnty. Prob. Ct.*, 392 F.3d 151, 161 (6th Cir. 2004) (“Courts have interpreted the FLSA’s ‘personal staff’ and ‘policymaking’ exemptions consistently with their Title VII counterparts.”). Finally, courts turn to Title VII to construe the EPA. *Spann-Wilder v. City of N. Charleston, C.A. No. 2:08-0156-MBS*, 2010 WL 3222235, at \*4 n.4 (D.S.C. Aug. 13, 2010) (“Because of the identical language in Title VII and EPA, these exceptions are interpreted in the same way under both statutes.”) (referencing *Bland v. New York*, 263 F. Supp. 2d 526, 536 (E.D.N.Y. 2003) (“This exemption [under Title VII] is identical to exemptions under the ADEA . . . the Fair Labor Standards Act . . . and Equal Pay Act and a number of other statutes.”)).

71. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601 § 1, 80 Stat. 830 (1966) (current version at 29 U.S.C. §§ 201–219 (2006)). For more discussion, see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533 (1985) (citing the Fair Labor Standards Amendments of 1966, 29 U.S.C. §§ 201–219 (2006)).

72. Fair Labor Standards Amendments of 1974 § 6.

73. The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 § 2(5), 86 Stat. 103 (current version at 42 U.S.C. § 2000e (2006)), excluded from Title VII and ADEA protections “any

employee in the FLSA also applies to the FMLA because the FMLA incorporates by reference the FLSA’s definition of “employee.”<sup>74</sup>

## II. CIRCUIT COURTS ARE WIDELY SPLIT OVER WHICH EMPLOYEES ARE EXCLUDED FROM STATUTORY WORKER PROTECTIONS

Circuit courts disagree over which types of employees fall within the “policymaking-level” exception from federal employment protections. The Seventh Circuit has adopted a sweeping construction, applying the exclusion to workers who so much as *suggest* policies to the decision-makers, or who exercise discretion in implementing others’ policies.<sup>75</sup> By contrast, other circuits apply a far narrower definition, reserving the exception for top public officials.<sup>76</sup> The narrow approach is most thoroughly developed by the Second Circuit, which has expressly rejected the Seventh Circuit’s standard.<sup>77</sup> The Second Circuit holds that the policymaking-level exception applies only to appointees who “would normally work closely with and be accountable to the [elected] official who appointed them.”<sup>78</sup>

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person elected to public office . . . or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office . . . [except] employees subject to the civil service laws.” The Fair Labor Standards Amendments of 1974 § 6, excluded from FLSA protections any individual who “(I) holds a public elective office . . . [or] (II) is selected by the holder of the office to be a member of his personal staff [or] (III) is appointed by such an officeholder to serve on the policymaking level, OR (IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.”

74. 29 U.S.C. § 2611(3) (2006); *see* O’Reilly v. Montgomery Cnty., No. 102CV1242-DFH, 2003 WL 23101795, at \*7 (S.D. Ind. Feb. 24, 2003).

75. *See, e.g.*, Upton v. Thompson, 930 F.2d 1209, 1215 (7th Cir. 1991).

76. *See infra* Parts II.C., II.D.

77. *Butler v. N.Y. State Dep’t of Law*, 211 F.3d 739, 746 (2d Cir. 2000). For First Amendment political patronage cases, that circuit uses a list of guiding factors to address the *Elrod* and *Branti* tests. *Id.* at 744. “Our Title VII analysis, by contrast, draws on the language of the statute and congressional intent.” *Id.* at 747.

78. *EEOC v. Vermont*, 904 F.2d 794, 800 (2d Cir. 1990), *overruled in part by* *Gregory v. Ashcroft*, 501 U.S. 452 (1991). The Second Circuit later clarified that it read the U.S. Supreme Court’s overruling of *Vermont* as applying only to the circumstance of that case. The circuit has since said the underlying analysis remains valid, as does that circuit’s standard for determining policymaking status. “Its reasoning was still sound.” *Butler*, 211 F.3d at 748; *see also* *Tranello v. Frey*, 962 F.2d 244, 250 (2d Cir. 1992) (holding that a deputy county attorney was not exempted from the ADEA: “We reaffirm our adherence to the sound conclusion reached on this issue in *Vermont*, . . . ‘Congress meant to deny ADEA protection only to such appointees as would normally work closely with and be accountable to the official who appointed them.’” (quoting *Vermont*, 904 F.2d at 800)).

A. *The U.S. Supreme Court Has Evaluated the Definition of “Policymaking Level” in Establishing Separate “Political Patronage” Rules*

To interpret the policymaking-level exception within the employment statutes, the Seventh Circuit imported U.S. Supreme Court jurisprudence related to workers’ free speech rights. Under the First Amendment, public employers may not hire or fire workers based on the employees’ political beliefs—a practice known as political patronage.<sup>79</sup> However, the Court long ago identified a need to balance workers’ constitutional right of free speech against the pragmatic need to prevent obstructive partisanship within government operations.<sup>80</sup> Specifically, newly elected officials could be hampered if forced to retain certain appointees with opposing political views.

In *Elrod v. Burns*,<sup>81</sup> employees of a county sheriff’s department asserted they had been fired or threatened with termination because they did not belong to the same political party as the sheriff.<sup>82</sup> The workers claimed the dismissals violated their First and Fourteenth Amendment rights.<sup>83</sup> A plurality of the U.S. Supreme Court agreed—to a point.<sup>84</sup> The plurality held patronage dismissals unconstitutional when applied to employees who are not policymakers.<sup>85</sup> Thus, the *Elrod* plurality held that politicians enjoyed a limited right to install like-minded and “political[ly] loyal[]” “policymaking” officials who would not undermine the agenda of a newly elected administration, which was “presumably sanctioned by the electorate.”<sup>86</sup> In other words, if voters replace an official with someone from a different political party, the newly elected official should not be forced to retain a potentially obstructionist second-in-command whose loyalty remains with the former boss. The *Elrod* Court provided no bright-line rules for determining policymaking-level status. Instead, it explained that courts

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79. *Elrod v. Burns*, 427 U.S. 347, 359 (1976).

80. *Id.* at 367.

81. *Id.* at 347.

82. *Id.* at 349–51.

83. *Id.* at 350. The U.S. Supreme Court explained patronage thusly in *Elrod*: “Under that practice, public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party. The threat of dismissal for failure to provide that support unquestionably inhibits protected belief and association . . . .” *Id.* at 359.

84. *Id.* at 360 (“[T]he prohibition on encroachment of First Amendment protections [by political patronage] is not absolute. Restraints are permitted for appropriate reasons.”).

85. *Id.* at 372–73.

86. *Id.* at 367.

should determine policymaker status based on “whether the employee acts as an advisor or formulates plans for the implementation of broad goals.”<sup>87</sup>

Four years later, the U.S. Supreme Court modified its exclusion from the political patronage rule. In *Branti v. Finkel*,<sup>88</sup> the Court signaled that “policymaking” was not a litmus-test trait; rather, it is sometimes proper for politics to drive the hiring or termination decisions of subordinates “who are neither confidential nor policymaking in character.”<sup>89</sup> The *Branti* court clarified that it intended the doctrine to allow employers greater discretion “if an employee’s private political beliefs would interfere with the discharge of his public duties.”<sup>90</sup> The Seventh Circuit has held the Court’s rules allowing for limited political discrimination should also apply in statutory worker rights claims.

*B. The Seventh Circuit Applies the Elrod/Branti Standard to Define the “Policymaking-Level” Exception in Federal Employment Statutes*

The Seventh Circuit adopted the U.S. Supreme Court’s political patronage analyses in *Elrod* and *Branti* to define the reach of Title VII and other employment discrimination statutes.<sup>91</sup> First, while deciding a patronage case in 1981, the Seventh Circuit interpreted *Elrod* and *Branti* to direct that politically motivated hiring and termination are lawful when “the position held by the individual authorizes, either directly or indirectly, meaningful input into governmental decisionmaking on issues where there is room for principled disagreement on goals or their implementation.”<sup>92</sup> Then, in 1993, the Seventh Circuit announced that

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87. *Id.* at 368.

88. 445 U.S. 507 (1980).

89. *Id.* at 518 (citing, as an example, hiring election precinct supervisors from certain political parties when election laws require representation of different political parties). Furthermore, “the ultimate inquiry is not whether the label ‘policymaker’ or ‘confidential’ fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.” *Id.* Applied to the instant case: “[W]hatever policymaking occurs in the public defender’s office must relate to the needs of individual clients and not to any partisan political interests.” *Id.* at 519. While endorsing a potentially broader exception from political patronage law, the *Branti* Court ruled for the plaintiffs in the instant case; the Court held that two assistant county public defenders were *not* policymakers and therefore it would be unconstitutional to fire them based on their political views. *Id.* at 519–20.

90. *Id.* at 517 (explaining that in such cases, a worker’s “First Amendment rights may be required to yield to the State’s vital interest in maintaining governmental effectiveness and efficiency”).

91. *Heck v. City of Freeport*, 985 F.2d 305, 310 (7th Cir. 1993).

92. *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981).

the same rule applied to federal employment statutes, starting with the ADEA.<sup>93</sup> In affirming the dismissal of an age discrimination claim by a former city health inspector, the court said: “[t]he reasons for exempting the office from the patronage ban apply with equal force to the requirements of the ADEA.”<sup>94</sup> The Circuit has reaffirmed this standard in more than one dozen cases.<sup>95</sup>

The Seventh Circuit has rejected a bright line between policymaking and policy implementation.<sup>96</sup> Indeed, the court applied the policymaking-level exception to an appointee who claimed he was expressly disallowed from making policy, deeming him at the policymaking level because he *might advise* the actual policymakers.<sup>97</sup> The Circuit has explained that actual authority is not required to qualify for policymaking-level status if the employee in question enjoys sufficient access to the decision-maker, i.e., if he or she offers input, yet without control.<sup>98</sup> Similarly, sheriff’s deputies fall within the Seventh Circuit’s exception because they exercise discretion while on patrol.<sup>99</sup>

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93. *Heck*, 985 F.2d at 310. In *Heck*, the plaintiff alleged both political and age discrimination claims. The Seventh Circuit first considered the political patronage question. *Id.* at 308. The court held that the plaintiff was a policymaker under *Elrod* and *Branti*, which, in the Seventh Circuit, is based on whether the position “authorizes, either directly or indirectly, meaningful input into government decisionmaking.” *Id.* at 309 (citations omitted) (quoting *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985)). Thus, the court held, the plaintiff did not qualify for First Amendment protection. *Id.* at 310. The court later moved to the question of the ADEA and simply upheld a lower court holding—without providing analysis of the ADEA’s language or history—that the *Elrod/Branti* standard applies. *Id.* Three years later, the Seventh Circuit ratified that standard and endorsed its use in Title VII cases. *See, e.g., Americanos v. Carter*, 74 F.3d 138, 144 (7th Cir. 1996) (again omitting discussion of the statute’s plain text or legislative history).

94. *Heck*, 985 F.2d at 310.

95. *See, e.g., Pleva v. Norquist*, 195 F.3d 905 (7th Cir. 1999) (dismissing a case brought by a former city zoning board chairman); *Americanos*, 74 F.3d 138 (dismissing a case brought by a former deputy state attorney general).

96. *Opp v. State’s Att’y of Cook Cnty.*, 630 F.3d 616, 621 (7th Cir. 2010) (“The appellants contend that Assistant State’s Attorneys merely implement policy actions on behalf of the State’s Attorney. We disagree. An Assistant State’s Attorney carries out policy on behalf of the government, and in doing so has ‘meaningful input into governmental decision-making . . .’”).

97. *See Americanos*, 74 F.3d 138. The *Americanos* court acknowledged plaintiff’s contention that he “‘was required to refer all issues and questions involving politics and policy making to the Chief Counsel,’ [who would] make the ultimate decision on how to implement the AG’s goals.” *Id.* at 142. And yet the court deemed the employee to be on the policymaking level because “‘it is likely that in making such referrals *Americanos* was asked to advise his superiors concerning what his research into these issues revealed, and what he thought would be the correct course of legal action.’” *Id.* (emphasis added).

98. *Warzon v. Drew*, 60 F.3d 1234, 1240 (7th Cir. 1995).

99. *Upton v. Thompson*, 930 F.2d 1209, 1215 (7th Cir. 1991) (“[D]eputies on patrol or other assignment frequently work autonomously, giving them wide latitude and discretion in the performance of their duties and in the implementation of department goals.”).

The Seventh Circuit’s interpretation of “policymaking level” also includes, for instance, research analysts who provide information that might influence actual decisionmakers.<sup>100</sup>

The Seventh Circuit recently applied the “policymaking” label to another broad job title: state assistant attorneys general. In *Opp v. Office of State’s Attorney of Cook County*,<sup>101</sup> three former assistant state’s attorneys alleged that age discrimination motivated their 2007 terminations, in violation of the ADEA.<sup>102</sup> A federal district court dismissed their claims on the ground that they are not covered by the ADEA.<sup>103</sup> The Seventh Circuit upheld the decision, holding as a matter of law that the state’s nine hundred assistant attorneys general qualify as “policymakers.”<sup>104</sup>

In *Opp*, the Seventh Circuit explicitly rejected the plaintiffs’ request that the court abandon its unique test and develop a standard for the policymaking-level exception that squares with other circuits.<sup>105</sup> Instead, the court stood by its practice of effectively equating policy implementation with policymaking:

The appellants contend that Assistant State’s Attorneys merely implement policy actions on behalf of the State’s Attorney. We disagree. An Assistant State’s Attorney carries out policy on behalf of the government, and in doing so has “meaningful input into governmental decision-making on issues where there is room for principled disagreement on goals or their implementation.”<sup>106</sup>

In other words, it held, simply “carry[ing] out” policy directives “on behalf” of the officials who hold actual authority to set such policies amounts to serving at the policymaking level.<sup>107</sup>

C. *The Second Circuit Uses Legislative Language and Intent to Construe the Scope of the “Policymaking Level”*

The Second Circuit first construed the policymaking-level exception

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100. *Bonds v. Milwaukee Cnty.*, 207 F.3d 969, 977 (7th Cir. 2000).

101. *Opp*, 630 F.3d at 616.

102. *Id.* at 618–19.

103. *Opp v. Office of State’s Att’y of Cook Cnty.*, 660 F. Supp. 2d 932 (2009).

104. *Opp*, 630 F.3d at 620–21.

105. *Id.* at 620 (“We choose . . . not to draw a distinction between how aggrieved individuals are interpreted as policymakers under the First Amendment and under the ADEA.”).

106. *Id.* at 621.

107. *Id.*



in 1990 in *EEOC v. Vermont*.<sup>108</sup> There, the court turned to traditional canons of statutory construction to determine the breadth of the policymaking-level exception.<sup>109</sup> First, the court examined the ADEA's definition of "employee."<sup>110</sup> The statute lists "policymaking level" as the second of three categories exempted from that definition.<sup>111</sup> The *Vermont* court noted that the first and third classes—"personal staff" and "immediate adviser(s)"<sup>112</sup>—are narrow, "suggest[ing] that Congress intended [a] more limited interpretation" of the exempted categories.<sup>113</sup> The court found that these categories "plainly" refer only to employees who "work closely" with officials.<sup>114</sup> The court then inferred that Congress intended the policymaking-level category to generally align in scope with those more limited categories.<sup>115</sup> Had Congress intended the policymaker category to be read more broadly than the other categories, it likely would have put that class at the end of the list.<sup>116</sup>

The *Vermont* court next considered the legislative history of Title VII.<sup>117</sup> Congress created exceptions for policymaking-level appointees and others in the 1972 Title VII amendments that expanded the law to government employees.<sup>118</sup> Lawmakers similarly amended the ADEA two years later.<sup>119</sup> Discussing an earlier version of the amendment (which did not yet include the "policymaking-level" exception), the bill's manager<sup>120</sup> told his colleagues: "[t]he purpose of the

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108. *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990), *overruled in part by* *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

109. *See id.* at 798 ("The contents and structure of the exception suggest that Congress intended the more limited interpretation.").

110. *Id.*

111. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(f) (2006).

112. *Id.*

113. *Vermont*, 904 F.2d at 798.

114. *Id.*

115. *Id.*

116. *Id.* ("[W]e would infer that the middle category was intended to share basic characteristics of the categories that surrounded it.")

117. *Id.* ("Though there is scant legislative history with respect to the definition of 'employee' in the ADEA, we are aided by the fact that the ADEA was patterned after Title VII . . ."); *see also* Sape, *supra* note 60.

118. *See supra* Part I.A.

119. *See supra* Part I.A.

120. During congressional floor debates, "the bill manager for the majority party controls the time devoted to debate and to particular amendments, determining which members speak and for how long." Mathew D. McCubbins & Daniel B. Rodriguez, *Statutory Meanings: Deriving Interpretive Principles from a Theory of Communication and Lawmaking*, 76 BROOK. L. REV. 979, 988 (2011).

amendment . . . [is] to exempt from coverage those who are chosen by the . . . elected official . . . and who are in a *close personal relationship and an immediate relationship with him*. Those who are his first line of advisers.”<sup>121</sup> Lawmakers later added the exemption for appointees at the policymaking level. They issued a statement explaining that their intention was to exempt “persons . . . *at the highest levels* of the departments or agencies . . . *such as cabinet officers, and persons with comparable responsibilities* . . . . It is (our) intent that this exemption shall be *construed narrowly*.”<sup>122</sup> From that legislative history, the *Vermont* court concluded: “Congress meant to deny ADEA protection only to such appointees as would normally work closely with and be accountable to the official who appointed them.”<sup>123</sup>

The U.S. Supreme Court effectively overruled the Second Circuit’s *Vermont* holding that state judges were not policymakers.<sup>124</sup> However, the Second Circuit has since stood by its underlying reasoning in *Vermont* that the exception was to be narrowly construed and applied only to “such appointees as would normally work closely with and be accountable to the official who appointed them.”<sup>125</sup> Most recently, in *Butler v. New York State Department of Law*,<sup>126</sup> the Second Circuit reaffirmed its rule that courts should narrowly construe<sup>127</sup> the policymaking exception to apply only to appointees holding “policymaking positions at the highest levels”<sup>128</sup> of government agencies who “would normally work closely with and be accountable to the official who appointed them.”<sup>129</sup>

#### D. Other Circuits Support the Second Circuit’s General Approach

Several other circuits have adopted standards for interpreting the

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121. *EEOC v. Vermont*, 904 F.2d 794, 799 (2d Cir. 1990), *overruled in part by* *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (emphasis in original) (citing 118 CONG. REC. 4492–93 (1972)).

122. H.R. REP. NO. 92-238, at 43 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2180, 1971 WL 11301 (emphasis added).

123. *Vermont*, 904 F.2d at 800.

124. *Gregory v. Ashcroft*, 501 U.S. 452 (1991). The Second Circuit acknowledged that *Gregory* overruled its specific holding in *Vermont* that an appointed state judge was not an appointee on the policymaking level. *Tranello v. Frey*, 962 F.2d 244, 249 (2d Cir. 1992).

125. *See Tranello*, 962 F.2d at 250.

126. 211 F.3d 739 (2d Cir. 2000).

127. *Id.* at 749.

128. *Id.* at 747 (quoting *Vermont*, 904 F.2d at 800).

129. *Id.* at 748 (“The resolution of the issue turns on whether it was part of the job of a Deputy Bureau Chief to work closely with the AG.”).

scope of the “policymaking-level” exception similar to that of the Second Circuit.<sup>130</sup> The First Circuit has agreed that Title VII’s legislative history indicates that Congress intended its exceptions to be narrowly construed to apply only to “top decisionmakers.”<sup>131</sup> Similarly, the Tenth Circuit held that the Civil Rights Act’s legislative history reflects Congress’s intent to create a “narrow exemption” for appointed employees in a “close, personal . . . and . . . immediate relationship” with their appointer.<sup>132</sup> Accordingly, the court held that a city staff director did not serve at the policymaking level, in part because “the staff director has occasionally advised the mayor on his constitutional and legal powers . . . . Direct interaction between the mayor and the staff director is minimal.”<sup>133</sup>

The Eighth Circuit has also examined policymaking-level status according to the appointee’s authority and related factors.<sup>134</sup> Without relying heavily on the legislative history of Title VII,<sup>135</sup> the Eighth Circuit reached a conclusion similar to that of the Second Circuit: Congress’s exemption of appointees on the policymaking level “manifests an interest in excluding persons entrusted with extensive decisionmaking authority and discretionary power. . . .”<sup>136</sup> In an earlier

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130. The Fifth Circuit has not extensively evaluated the meaning of “policymaking level.” However, it has generally endorsed a narrow construction of the exceptions. *See, e.g.,* *Rutland v. Moore*, 54 F.3d 226, 230 n.6 (5th Cir. 1995) (citing Congressional conference committee statement that the exception was intended to apply “at the highest levels . . . such as cabinet officers”); *Teneyuca v. Bexar Cnty.*, 767 F.2d 148, 152 (5th Cir. 1985) (in evaluating the related but separate “personal staff” exception, directing: “This Court’s consideration of these factors must be tempered by the legislative history of this provision which indicates that the exception is to be narrowly construed”).

131. *EEOC v. Massachusetts*, 858 F.2d 52, 56 (1st Cir. 1988) (holding judges at the policymaking level for the purposes of the ADEA).

132. *Crumpacker v. Kan. Dep’t of Human Res.*, 474 F.3d 747, 752 (10th Cir. 2007) (holding Congress intended the exception would apply to appointees with an “intimate and sensitive association” with the elected official (quoting *Anderson v. City of Albuquerque*, 690 F.2d 796, 801 (10th Cir. 1982))).

133. *Anderson*, 690 F.2d at 801.

134. *See, e.g.,* *Gregory v. Ashcroft*, 898 F.2d 598, 603–04 (8th Cir. 1990), *aff’d*, 501 U.S. 452 (1991); *Stillians v. Iowa*, 843 F.2d 276, 278–79 (8th Cir. 1988), *overruled on other grounds by* *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104 (1991).

135. *Gregory*, 898 F.2d at 602 (noting about the legislative history: “we are not inclined to assign [it] a great deal of weight, since the only reliable guide to legislative intent is the language and structure of the statute itself”).

136. *Id.* at 603. *Gregory* held that judges serve on the policymaking level because at least some of their decisions “will resolve issues previously unsettled and thus will create law . . . . [J]udges must exercise the same sort of discretion in decisionmaking, temper their rulings with the same sort of self-restraint, and engage in the same sort of thoughtful judgment that is required of ‘appointee[s] on the policymaking level’ in the executive and legislative branches.” *Id.* at 601–02.

case deciding an ADEA claim by a former state arts council director,<sup>137</sup> the Eighth Circuit spelled out several factors for evaluating whether the plaintiff was appointed at the policymaking level: (1) “whether the [appointee] has discretionary, rather than solely administrative powers,” (2) “whether the [appointee] serves at the pleasure of the appointing authority”; and (3) whether the appointee “*formulates* policy.”<sup>138</sup> Thus, the Eighth Circuit generally accords with the First, Second, and Tenth Circuits in narrowly defining the scope of the policymaking-level exception within the context of worker right statutes. These Circuits have parted ways with the Seventh Circuit, which has adopted a relatively expansive interpretation of the policymaking exception based on analogy to political discrimination in employment law.

### III. CONGRESS OR THE U.S. SUPREME COURT SHOULD LIMIT THE POLICYMAKING EXCEPTION TO APPOINTEES WHO DIRECTLY FORMULATE SUBSTANTIVE POLICY

Although Congress neglected to define “policymaking level” for the purposes of worker protection statutes, lawmakers did provide ample explicit and implicit guidance. The plain language of the statutes in question, their legislative history, and their context within broader social policy goals illuminate the shortcomings of the analyses by both camps in the circuit split. The Seventh Circuit makes two errors: (1) it improperly borrows a standard from the separate political discrimination doctrine, neglecting to follow fundamental canons of statutory construction; and (2) it misconstrues the *Elrod/Branti* doctrine that it imports from political patronage jurisprudence. The Second Circuit and others take a better approach, which honors the employment statutes’ language according to traditional canons of construction. However, that approach lacks sufficient lucidity and specificity. To correct these inadequacies and inconsistencies, either Congress or the U.S. Supreme Court should articulate a clear standard defining policymaking-level employees as top-level officials with working relationships with their appointees who are charged with substantive policy development.

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137. *Stillians*, 843 F.2d 276.

138. *Id.* at 278–79 (emphasis added). Two years later, the Eighth Circuit clarified that the factors were not intended to be an all-purpose test: the list is not “intended to be exhaustive or necessarily applicable in all respects to every kind of appointed official.” *Gregory*, 898 F.2d at 604.

A. *The Plain Language of the Statutes Supports a Narrow Construction of the Policymaking Exception*

Statutory construction begins “with the text of the statute.”<sup>139</sup> Where a word or phrase is ambiguous, context clarifies.<sup>140</sup> As Judge Learned Hand explained, statutory interpretation requires a holistic approach because words and phrases share a “communal existence” where individual segments inform neighboring words and “not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.”<sup>141</sup> Under the canon of construction *noscitur a sociis*, “an ambiguous term may be given more precise content by the neighboring words with which it is associated.”<sup>142</sup> When a statute includes enumerated terms, any relatively general terms accompanied by narrower counterparts should be narrowly construed under the “venerable principle of *ejusdem generis*” which “counsels us to construe the broad in light of the narrow.”<sup>143</sup>

Here, Congress included the “policymaking level” as the second of three enumerated categories of exempted employees: “personal staff,” “employees on the policymaking level,” and “immediate advisers.”<sup>144</sup> As the Second Circuit explained,<sup>145</sup> courts should construe the policymaking category within its statutory context—or in Judge Hand’s words, its “communal existence.”<sup>146</sup> Also, under the canon of *noscitur a sociis*, which directs consideration of surrounding language when interpreting a specific term, the middle (“policymaking”) term should be construed to share the same narrow character as the first and third categories. Finally, the “policymaking-level” exception should not be read to refer to policy advisers since that would improperly render the two categories redundant.<sup>147</sup>

Rather than studying the statutes in question, the Seventh Circuit turned for direction by analogy to the U.S. Supreme Court’s political

139. *Permanent Mission of India v. City of New York*, 551 U.S. 193, 197 (2007).

140. *Nat’l Labor Relations Bd. v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941).

141. *Id.*

142. *United States v. Stevens*, \_\_U.S.\_\_, 130 S. Ct. 1577, 1588 (2010) (internal quotation marks omitted).

143. *United States v. Lyckman*, 235 F.3d 234, 238 (5th Cir. 2000); *see also* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001).

144. *E.g.*, 42 U.S.C. § 2000e(f) (2006).

145. *EEOC v. Vermont*, 904 F.2d 794, 798 (2d Cir. 1990).

146. *Nat’l Labor Relations Bd. v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941).

147. *See* 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 21:1 (7th ed. 2008).

discrimination case law.<sup>148</sup> The Seventh Circuit skipped over traditional analysis of the statutes’ language and Congress’s intent,<sup>149</sup> and instead applied the *Elrod/Branti* to statutory discrimination cases.<sup>150</sup> While courts may sometimes properly construe statutes by analogy to other laws, even unrelated laws,<sup>151</sup> the statutory language here is readily interpreted and does not require such a stretch.

Moreover, neither *Elrod* nor *Branti* support the approach adopted by the Seventh Circuit. Rather, *Elrod* suggested a narrow scope in its exception from the general prohibition against political patronage: “In determining whether an employee occupies a policymaking position, consideration should . . . be given to whether the employee acts as an adviser or *formulates plans* for the implementation of broad goals.”<sup>152</sup> *Elrod* and *Branti* were intended only to facilitate the democratic process by allowing newly elected officials to replace politically hostile incumbent officers at the top levels of government.<sup>153</sup> In contrast, the Seventh Circuit recasts the patronage standards to exempt a wide swath of workers from basic employment laws.<sup>154</sup> The disconnect is manifest:

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148. *Heck v. City of Freeport*, 985 F.2d 305, 311 (7th Cir. 1993).

149. In 1993, the Seventh Circuit held that a plaintiff was exempt from patronage protection because he was a policymaker under *Elrod* and *Branti*. *Heck*, 985 F.2d at 310. The court then held the same plaintiff exempt from ADEA protection for the same reason, without providing analysis of the ADEA’s language or history. *Id.* at 310. The Second Circuit explained: “The Seventh Circuit has used a single test to resolve the policymaker question under both the First Amendment and the employment discrimination statutes . . . . Our Title VII analysis, by contrast, draws on the language of the statute and congressional intent.” *Butler v. N.Y. State Dep’t of Law*, 211 F.3d 739, 746–47 (2d Cir. 2000); *see also supra* text accompanying note 92.

150. *See, e.g., Heck*, 985 F.2d at 310 (“The reasons for exempting the office from the patronage ban apply with equal force to the requirements of the ADEA.”).

151. 2B SINGER & SINGER, *supra* note 147, § 53:2. However, the Seventh Circuit’s adoption of the standard from the U.S. Supreme Court’s First Amendment political patronage jurisprudence should not be evaluated under the canon of *in pari materia*. *In pari materia* is a canon of construction directing that matters that are of the “same subject” or “relating to the same matter” may be construed together. BLACK’S LAW DICTIONARY 807 (8th ed. 2004). The borrowed patronage standard used here is extrinsic to the employment rights statutes at issue and does not “pertain to the same particular subject with sufficient focus to make it reasonable to suppose that legislators and persons affected by one statute would also be affected by another. . . . Where the relationship between the statutes is not that specific . . . the interpretive relevance of other statutes is found, if at all, in the evidence they may supply that certain modes of legislative action are sufficiently conventional or standardized in the legal system to influence the thinking of legislators and others who contemplate the meaning of a particular statute in the system.” 2B SINGER & SINGER, *supra* note 151, § 53:2 (citations omitted).

152. *Elrod v. Burns*, 427 U.S. 347, 368 (1976) (emphasis added).

153. *See supra* Part II.A.1.

154. *See, e.g., Opp v. State’s Att’y of Cook Cnty.*, 630 F.3d 616, 622 (7th Cir. 2010) (holding as a matter of law that hundreds of assistant state attorneys general are appointed on the policymaking level).

the *Elrod* plurality declined to deem a *chief* deputy sheriff a policymaker in a political discrimination claim.<sup>155</sup> Yet the Seventh Circuit has twice applied *Elrod* to reach the opposite conclusion in political patronage cases: holding as a matter of law that deputy sheriffs *were* policymakers and thus unprotected.<sup>156</sup> The Circuit's reasoning that patronage caselaw directs its statutory construction is especially awkward given the U.S. Supreme Court's direction *against* reliance on a strict "policymaking" label in patronage cases. The Court clarified in *Branti* that its patronage exception was *not* to be applied according to a mechanical "policymaking-level" test; rather, the proper inquiry was whether partisan allegiance was an "appropriate requirement" for the position in question.<sup>157</sup> Notably, *Branti* dissenters lamented their prediction that the majority's holding would mean that assistant government attorneys would *not* be exempt from the patronage ban.<sup>158</sup> Yet the Seventh Circuit recently relied on its reading of *Elrod* and *Branti* to justify deeming all Illinois assistant attorneys general as policymaking-level appointees, and therefore excluded from workers' rights protections.<sup>159</sup> Courts in that circuit have repeatedly defined state attorneys and prosecutors as policymaking-level appointees as a matter of law.<sup>160</sup>

The misconstruction of the standard has not gone unnoticed. As the Eleventh Circuit said, "Application of the Seventh Circuit's broad test has led to results far afield from *Branti*."<sup>161</sup> For example, in *Americanos*

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155. *Elrod*, 427 U.S. at 367–74 (creating policymaking exception to bar on patronage, but declining to apply that exception to respondents in the instant case, including a chief deputy sheriff). Also, the dissent commented on the narrow scope of the exception. *Id.* at 386–87 n.10 (Burger, J., dissenting) ("The judgment today is limited to nonpolicymaking positions . . . [I]t is doubtful that any significant number of employees can be identified as policymakers in a sheriff's office. States have chosen to provide for the election of many local officials who have little or no genuine policymaking functions . . . and the subordinates of such officials are even less likely to have such functions. It thus is predictable that the holding today will terminate almost completely the contributions of patronage hiring practices to the democratic process.").

156. *Heideman v. Wirsing*, 7 F.3d 659, 664 (7th Cir. 1993); *Upton v. Thompson*, 930 F.2d 1209, 1218 (7th Cir. 1991).

157. *Branti v. Finkel* 445 U.S. 507, 518 (1980) ("[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.").

158. *See Branti*, 445 U.S. at 524 (Powell, J., dissenting) ("[I]t would be difficult to say, under the Court's standard, that 'partisan' concerns properly are relevant to the performance of the duties of a United States attorney.").

159. *Opp*, 630 F.3d at 622.

160. *See, e.g.,* *Americanos v. Carter*, 74 F.3d 138, 142 (7th Cir. 1996); *Livas v. Petka*, 711 F.2d 798, 800 (7th Cir. 1983).

161. *Cutcliffe v. Cochran*, 117 F.3d 1353, 1357 n.4 (11th Cir. 1997).

v. *Carter*,<sup>162</sup> the Seventh Circuit withheld age discrimination protection from a deputy Indiana state attorney general (“DAG”) based on its holding that he was categorically disqualified from patronage protection by *Elrod* and *Branti*. The court wrote: “if *some* DAGs can be terminated based on their political affiliation, *all* can be.”<sup>163</sup> However, the Eleventh Circuit explained that, “*Americanos* appears to lie in sharp contrast to the facts of *Branti* itself, where the U.S. Supreme Court held that assistant public defenders were *protected* from patronage dismissal.”<sup>164</sup> Thus, while the Seventh Circuit is resolute in its reliance on patronage case law to interpret worker-rights statutes, its skewed application of the patronage standards garners different results than did the Court in the underlying cases.

*B. Congress Intended a Limited Scope for the Policymaking-Level Exception to These Remedial Measures*

Beyond the statutes’ text, legislative history reveals Congress’s intent to create a narrow exception for employees at the “policymaking level.” When a statutory provision is ambiguous, it is proper to turn to the statute’s legislative history for guidance as to Congress’s intent.<sup>165</sup> Moreover, if an alternative interpretation clashes with legislative intent as reflected in legislative history, courts should adhere to the non-conflicting interpretation.<sup>166</sup> Among legislative history documents, a congressional conference report is “recognized as the most reliable evidence of congressional intent . . . .”<sup>167</sup>

Congress unequivocally indicated its intent was for only narrow exceptions to the statutes. A congressional leader told his colleagues during the development of the exceptions that the purpose was to exclude only “first line advisers” who are “in a close personal . . . [and] immediate relationship” with their appointers.<sup>168</sup> Also, a congressional conference committee report explained: “This exemption is intended to

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162. *Americanos*, 74 F.3d at 138.

163. *Id.* at 141 (emphasis added).

164. *Cutcliffe*, 74 F.3d at 1357 n.4 (emphasis added).

165. *Gudenkauf v. Stauffer Commc’ns, Inc.*, 922 F. Supp. 465, 475 (D. Kan. 1996). The Seventh Circuit relied on legislative history and Congressional intent in construing a statute in *Graczyk v. United Steelworkers of Am.*, 763 F.2d 256, 262 (7th Cir. 1985).

166. *Marcor Dev. Corp. v. United States*, 20 Ct. Int’l Trade 538, 543 (1996) (citing *Kyocera Int’l, Inc. v. United States*, 2 Ct. Int’l Trade 91, 96 (1981), *aff’d*, *United States v. Kyocera Int’l, Inc.*, 681 F.2d 796 (C.C.P.A. 1982)).

167. *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996).

168. 118 CONG. REC. 4492–93 (1972).



be construed very narrowly and is in no way intended to establish an overall narrowing of the expanded coverage of State and local government employees.”<sup>169</sup> Ultimately, Congress issued a report explaining that it wanted the exceptions “construed narrowly” and applied only to cabinet members and such officials at the “highest levels” of government.<sup>170</sup>

Also, like all civil rights statutes, anti-discrimination statutes warrant broad application and only narrow exclusions.<sup>171</sup> Courts generally construe civil rights laws broadly in light of their remedial purpose.<sup>172</sup> To interpret the “policymaking-level” exception to deny protections to workers who enjoy no genuine policy authority dilutes the statutes’ significance. The Seventh Circuit’s interpretation abandons broad classes of public workers, undermining Congress’s express intent. As one scholar observed when Congress expanded federal worker protections forty years ago: “it was the clear intention of Congress in enacting the 1972 amendments that the scope and effect of Title VII should be broadly construed to eliminate employment discrimination.”<sup>173</sup> A federal judge in Oregon said shortly after Congress amended Title VII that Congress intended exceptions only for those in “sensitive” or “intimate positions,” not, for example, for “large groups of faceless technicians and researchers.”<sup>174</sup> A broad construction defeats Congress’s policy goal in expanding Title VII and the other statutes to exclude a

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169. 118 CONG. REC. 7166–67 (1972).

170. H.R. REP. NO. 92-238 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2180, 1971 WL 11301.

171. The U.S. Supreme Court has directed that statutory policy objectives should guide statutory construction. *See* *Takao Ozawa v. United States*, 260 U.S. 178, 194 (1922) (“It is the duty of this court to give effect to the intent of Congress.”); *Walton v. Cotton*, 60 U.S. 355 (1856).

172. 3B SINGER & SINGER, *supra* note 147, § 76:6 (“Courts and commentators now generally agree . . . that civil rights acts are remedial and should be liberally construed so their beneficent objectives may be realized to the fullest extent possible. To this end, courts apply a broad and inclusive understanding of the language in legislation and initiatives to protect and implement civil rights . . . . Correlatively, courts strictly construe exceptions and limitations which restrict the operation of such laws.”); *see also* Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75 (1984) (“Title VII of the 1964 Civil Rights Act prohibits employment discrimination in the broadest possible terms . . . . Thus, courts have liberally interpreted the substantive and procedural provisions of Title VII to ensure the achievement of these goals.” (citations omitted)).

173. Sape, *supra* note 60, at 857. Note also, the U.S. Supreme Court has held that rules exempting some employers from the FLSA, “are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.” *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (citations omitted).

174. *Gearhart v. Oregon*, 410 F. Supp. 597, 600 (D. Or. 1976).

relatively small number of workers,<sup>175</sup> not sweeping categories of public servants.

*C. Any Remaining Ambiguity Is Resolved Under Proper Deference to the Narrow Construction Adopted by the EEOC*

The EEOC, the agency charged with enforcing statutes outlawing employment discrimination, has construed the “policymaking” exception in narrow terms. The U.S. Supreme Court directs courts to defer to that agency when evaluating Title VII, holding that “administrative interpretation of the Act by the enforcing agency is entitled to great deference.”<sup>176</sup> The EEOC has unambiguously explained that Congress intended the “policymaking-level” exceptions to apply to individuals who lead agencies and who “*work closely with* elected officials and their advisors in *developing policies* that will implement the overall goals of the elected officials.”<sup>177</sup> Also, the EEOC has explained that Congress intended the exceptions to allow elected officials “complete freedom” in appointing *agency directors* to work with them to “develop[ ] policies that will implement the overall goals of the elected officials.”<sup>178</sup> The Seventh Circuit’s rule flatly contradicts this guidance from the EEOC, contrary to the Court’s rule of agency deference.

*D. The Court or Congress Should Clarify that the Policymaking-Level Exception Applies Only to Top-Ranking Policy Players*

Either the U.S. Supreme Court or Congress must resolve the discord over the scope of the policymaking-level exception with a standard that honors the language of the workers’ rights laws and reflects Congress’s intent that the exception apply to a narrow set of high-ranking public

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175. Sape, *supra* note 60, at 847–48.

176. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971).

177. EEOC Decision No. 78-42, Empl. Prac. Dec. (CCH) ¶ 6725 (Sept. 29, 1978) (emphasis in original); *see also* EEOC Decision No. 78-33, Empl. Prac. Dec. (CCH) ¶ 6718 (June 1, 1978) (“The legislative history amply documents the intent of Congress that the exceptions to 701(f) are to be construed narrowly.”).

178. EEOC Decision No. 78-42, at \*1 (“In exempting policymaking appointees, Congress realized the necessity of allowing elected officials complete freedom in appointing those who would direct state and local departments and agencies. These individuals must work closely with elected officials and their advisors in developing policies that will implement the overall goals of the elected officials. In order to achieve these goals, an elected official is likely to prefer individuals with similar political and ideological outlooks. Congress intended to allow elected officials the freedom to appoint those with whom they feel they can work best.”).

officials (for example, cabinet-level positions).<sup>179</sup>

Neither of the circuits that have the most thoroughly-developed jurisprudence on the policymaking-level exception offers an appropriate, definitive standard. The Seventh Circuit's broad reading of the policymaking exception—labeling as policymakers public employees with basic discretion or the ability to offer input—contradicts the statutes' language and Congress's express intent. It is also at odds with the very case law it imports. Meanwhile, the Second Circuit's (rightly) narrower approach is insufficient and vague. That Circuit's standard—exempting only employees who “normally would work closely with and be accountable to”<sup>180</sup> their appointers—is potentially helpful as a guideline but falls short of a sufficiently definitive test. Congress was clear that its exceptions to the definition of employee in the workers' rights statutes were to be read narrowly and applied only to top-ranking employees, such as cabinet members.<sup>181</sup> The Second Circuit recognizes this limited scope, but lacks a lucid, relevant definition of policymaking-level exception. Either the U.S. Supreme Court or Congress should adopt the following three-part framework for evaluating whether an appointee falls within the exception to the civil rights laws: (1) does the appointee have a sufficiently direct relationship with the appointer?; (2) does the appointee establish policy, as opposed to merely advising or implementing policy?; and (3) does the appointee's authority reach to substantive policy, beyond procedural or administrative discretion?

*1. To Qualify as a Policymaking-Level Employee Under These Statutes, the Appointee Must Have a Direct Relationship with the Appointer*

As the statutory language and legislative history reflect, lawmakers intended the exception to apply to elected officials' closest confidants, not, for example, to middle managers who set administrative policies on bureaucratic matters.<sup>182</sup> Therefore, the law should limit the policymaking-level exception to appointees holding positions characterized by a direct and meaningful relationship with the official who appointed them. The Second Circuit rightly evaluated the standard

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179. *See supra* Part III.B.2.

180. *EEOC v. Vermont*, 904 F.2d 794, 800 (2d Cir. 1990), *overruled in part by* *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

181. H.R. REP. NO. 92-238, *supra* note 170; *see also* Sape, *supra* note 60, at 862 (citing 118 CONG. REC. S3461 (daily ed. Mar. 6, 1972); 118 CONG. REC. H1694 (daily ed. Mar. 8, 1972)).

182. *See supra* Part. III.B.2.

as one of access and accountability to the official.<sup>183</sup> Such a position would likely be directly supervised by the appointer, but the language and history of the statutory definition do not require such a relationship, as was implied by the Second Circuit.<sup>184</sup> Still, to qualify as policymaking-level, the appointee’s position must carry intimacy with the appointer on par with those of “immediate advisers” and “personal staff” members.<sup>185</sup>

2. *The Policymaking-Level Exception Should Apply Only to Positions that Involve Policy Formulation as a Fundamental Duty*

Before an appointee may be excluded from protections under this exemption, an employer should be required to show that the worker held the authority and the duty to set policy. This evaluation should rely on the inherent characteristics of the job as defined, not necessarily as performed by an individual plaintiff.<sup>186</sup> The employee must hold power to make policy, subject only to the approval of the appointer. The purpose of the exception was to exclude only those empowered to enact (or obstruct) the politicians’ substantive agenda. For these purposes, an appointee would not qualify as serving on the policymaking level if he or she advised on policy matters;<sup>187</sup> nor if he or she implemented or executed policy. Finally, to serve on the policymaking level, policymaking must be an essential attribute of the position.

3. *The Policymaking-Level Exception Should Only Apply to Positions Influencing Substantive Policy and Should Not Trickle down to Administrators or Bureaucrats with Day-to-Day Discretion*

The Seventh Circuit has deemed a sweeping range of public employees as policymaking-level appointees—from sheriff deputies<sup>188</sup> to assistant public attorneys<sup>189</sup>—simply because they enjoy discretion in day-to-day dealings. But Congress clearly intended a higher bar for the “policy” referred to in the “policymaking-level” exemption. The

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183. *Butler v. N.Y. State Dep’t of Law*, 211 F.3d 739, 748 (2d Cir. 2000).

184. *See, e.g., Butler*, 211 F.3d at 744.

185. *Vermont*, 904 F.2d at 798.

186. *Cf. Butler*, 211 F.3d at 749 (applying the exception to employees whose job descriptions carry certain attributes, rather than evaluating based on actual job performance).

187. Such an appointee might qualify under the separate “immediate adviser” exception.

188. *Heideman v. Wirsing*, 7 F.3d 659, 664 (7th Cir. 1993); *Upton v. Thompson*, 930 F.2d 1209, 1218 (7th Cir. 1991).

189. *Opp v. State’s Att’y of Cook Cnty.*, 630 F.3d 616 (7th Cir. 2010).

exception should be limited to employees who create policies that are substantive in nature, rather than merely procedural or administrative. Exempting those in the latter categories betrays the goal of the policymaking exemption because it would exclude administrators as well as policymakers. Adopting a narrower interpretation of the exemption also ensures appointees are not denied protections based on ad hoc or informal advising or because of defendants' disingenuous assertions of the appointee's authority.

The U.S. Supreme Court or Congress should follow the lead of the Pennsylvania Supreme Court, which spelled out what constitutes "policymaking" and "policy."<sup>190</sup> In a 1989 age discrimination case, the Pennsylvania court noted that the ADEA did not define "policymaking." The court turned to a *Webster's Ninth New Collegiate Dictionary* for guidance:

"Policymaking" may be defined as the act of elaborating policy . . . and "policy" is defined as "a definite course or method of action selected from among alternatives . . . to guide and determine present and future decisions" or "a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body."<sup>191</sup>

*Black's Law Dictionary* offers a similar take; it defines "policy" as: "The general principles by which a government is guided in its management of public affairs."<sup>192</sup> To foster consistency, federal law should similarly define policy and policymaking for the purposes of this exemption. To honor Congress's intent, that definition should clarify that the exception applies only to meaningful policy development, not bureaucratic discretion.

## CONCLUSION

Courts' inconsistent interpretations of the "policymaking-level" exception implicate workers' rights under several socially ambitious and important laws. These laws were intended to establish fundamental civil rights, to be denied only under the narrowest of conditions. The statutory language related to the policymaking-level exception, the statutes' legislative history, and the interpretation by the EEOC all indicate that the exception should be limited in scope. Moreover, there is no policy justification for allowing elected officials broad discretion to

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190. *In re Stout*, 559 A.2d 489, 495–96 (Pa. 1989).

191. *Id.*

192. BLACK'S LAW DICTIONARY 1196 (8th ed. 2004).

discriminate based on race, sex, religion, age, or caregiver status. No greater good is served if politicians are given wide room to circumvent wage and workplace standards laws.

Yet confusion and inconsistency have plagued courts dealing with public workers’ attempts to assert their rights. These circumstances demand a clear framework. To prevent further disharmony with Congressional intent, Congress or the U.S. Supreme Court must clarify the law to narrowly define the scope of the policymaking exception. If we allow officials greater discretion by denying public employees the protection of federal civil rights laws, it must be applied only to those whom Congress intended. Accordingly, the exception must be limited to appointees *making* substantive policy with meaningful authority and legitimately close relationships with their bosses.